No. 15647

United States Court of Appeals

FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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May It Please the Court:

Only one point of the brief for the appellee needs to be answered. That is Point Two at pages 18-20. There the appellee relies primarily upon *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954) (cert. denied 348 U. S. 970 (1955)), and *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957).

The ruling of the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), denying the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board,

is out of harmony with *Jencks* v. *United States,* 353 U. S. 657, 671 (1957). There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. In *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), as here, the summary of the FBI report was a "witness" against the appellant in the appeal board. In the trial court, as a basis for acquittal, the appellant in this case contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U. S. C. App. § 451 (c)) provides for "a system of selection which is fair and just." The Act says:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) Stat. 75.

Appellant to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the FBI report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the appellant was entitled by procedural due process of law in the district court to

attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call his "witness" (the FBI report), by the order excluding evidence.

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales* v. *United States,* 348 U. S. 407 (1955); *Simmons* v. *United States,* 348 U. S. 397 (1955); and *Sicurella* v. *United States,* 348 U. S. 385 (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting appellant's conscientious objector claims. This is through making an incomplete or inaccurate summary of the original FBI reports, suggested in *United States* v. *Nugent,* 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries thereof.

Even the United States Court of Appeals for the Fourth Circuit admitted this by a statement made in its opinion in the *Blalock* case. (247 F. 2d 615, at page 620) The Court said: "Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize." The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is

full and fair without reading the book? The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report, which was summarized, is produced for comparison.

A question similar to that presented here was submitted to the Court in *Simmons* v. *United States,* 348 U. S. 397 (1955). Read what the Court said in the last paragraph of that opinion. (348 U. S. at page 406) It was presented to the Court in other cases. See footnote 3 of the opinion of the court in *Blalock* v. *United States,* 247 F. 2d at page 621, (4th Cir. 1957). The denial of certiorari in those cases is insignificant. *United States* v. *Carver,* 260 U. S. 482, 490 (1923); compare special concurring opinion of Mr. Justice Frankfurter in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912 (1950).

In *Simmons* v. *United States,* No. 251, October Term, 1954, at page 17 of the Memorandum of the United States in Opposition, Judge Sobeloff, now of the Court of Appeals for the Fourth Circuit (then Solicitor General) told the Supreme Court of the United States: "However if the Court does not deem this issue determined by *Nugent,* we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal."[1] Since the date of the decision in *Jencks* v. *United States,* 353 U. S. 657 (June 3, 1957) (and before the opinion of the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957)) the United States District Court for the Western District of Washington in *United States* v. *Jacobson,* 154

[1] See the district court opinions: *United States* v. *Edmiston,* 118 F. Supp. 238, 240 (D. Neb. 1954); *United States* v. *Evans,* 115 F. Supp. 340, 343 (D. Conn. 1953); *United States* v. *Stull,* No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic,* 117 F. Supp. 371 (S.D. N.Y. 1953); *United States* v. *Parker,* No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, Butte Div., Nov. 30, 1953.

F. Supp. 103 (1957), decided the identical issue present here in conflict with the decision of the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957).

Generally the same cases cited by the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), in footnote 3 of its opinion may be distinguished. This is because they involved an attempt to subpoena the FBI report for the purpose of showing that adverse evidence against the registrant was withheld at the hearing in the Department of Justice. The reason they are distinguishable is that here the FBI reports are needed to determine whether favorable evidence has been withheld from the appeal board. In the cases referred to by the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), involving the withholding of unfavorable evidence at a hearing, it may be said the situation is different from the case here where favorable evidence is held back.[2] It may also be said, but not admitted, that the registrant is not unduly harmed in the administrative proceedings by withholding unfavorable evidence at the Department of Justice hearing. The reason may be that the written summary of the unfavorable evidence is all that reaches the appeal board and the registrant has the right to answer that before the appeal board. (*Gonzales* v. *United States,* 348 U. S. 407 (1955)) He has no way, however, of overcoming the prejudice done by holding back and not making known to him and to the appeal board of the favorable evidence.

Appellant suggests that it may be that the reason the petition for writ of certiorari was denied in *White* v. *United States,* 348 U. S. 970 (1955), after the statement made in the last paragraph of the opinion in *Simmons* v. *United States,* 348 U. S. 397, 406 (1955), was that the procedure established that day in *Gonzales* v. *United States,* 348 U. S. 407 (1955), would thereafter prevent the question from again arising or would be a sufficient

[2] Appellant does not admit that the holdings by the courts of appeals cited in footnote 3 of the *Blalock* opinion are correct.

guarantee against the denial of due process in cases involving unfavorable evidence not given to the registrant at the Department of Justice hearing.

The denial of certiorari in *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954), cert. denied, 348 U. S. 970 (1955), may have been based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States* v. *Nugent,* 346 U. S. 1 (1953), with *Gonzales* v. *United States,* 348 U. S. 407 (1955). The question decided in *White* v. *United States,* 215 F. 2d 782 (9th Cir. 1954), cert. denied 348 U. S. 970 (1955), was presented to the Court but not decided in *Simmons* v. *United States,* 348 U. S. 397, 406 (1955).

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrants may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although appellant does not concede this since the question is still open in the Court. See *Simmons* v. *United States,* 348 U. S. 397 (1955), and *Gonzales* v. *United States,* 348 U. S. 407 (1955). But in the case of

withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government and by the courts of appeals for not producing the FBI reports at the trials where the only question involved the use of unfavorable evidence.—*Campbell* v. *United States,* 221 F. 2d 454 (4th Cir. 1955); *United States* v. *Simmons,* 213 F. 2d 901 (7th Cir. 1954) (reversed on other grounds, 348 U. S. 397 (1955)).

The court below grounded its decision in this case upon *United States* v. *Nugent,* 346 U. S. 1 (1953). That decision gives no support for the holding in this case. Nugent involved only the question of whether all the adverse evidence in the FBI report should be given to the registrant during the administrative proceedings by submitting the original report to him. The Court held that giving a summary of the adverse evidence was sufficient. The question of whether the defendants in that case had the right to subpoena the FBI report at the trial was not determined, although it was raised in the brief filed in the Supreme Court.

Appellant is not here making a complaint that the original FBI report was not given to him in the administrative proceedings. He says that the summary of the report was inadequate and thus favorable evidence was withheld from the appeal board denying procedural due process and that the FBI report is material to determine that point. The *Nugent* case (346 U. S. 1) did not decide whether the FBI reports could be subpoenaed in the trial court for the purpose of testing the résumés made to the appeal board. No such résumé was even made in the *Nugent* case. That question was also undecided in that case, the same as it was in *Simmons* v. *United States,* 348 U. S. 397, 406 (1955).

Since the question was not decided by the Court in *Nugent* (346 U. S. 1 (1953)), then how can the court of

appeals in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), amend the decision of the Court in *Nugent* (346 U. S. 1 (1953)) by saying that it was decided? The very fact that the decision of the court in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957), is based upon a nonexistent holding by the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1 (1953), should guide this Court in refusing to follow the decision in *Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957). Consider the last two paragraphs of the opinion in the *Blalock* case, where the court indicates its extreme uncertainty about its holding.

It is submitted that the judgment of the court below should be reversed because (1) the decision of the court below is in direct conflict with *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944), and (2) the decision below also is out of accord with *Jencks* v. *United States,* 353 U. S. 657 (1957).

CONCLUSION

Wherefore, for the reasons above stated, as well as those set forth in appellant's main brief, appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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